No. 17-965

IN THE

Supreme Court of the United States

DONALD J. TRUMP,
President of the United States, *et al.*,

Petitioners,

v.

STATE OF HAWAII, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF FEDERAL COURTS SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

SARAH M. KONSKY
JENNER & BLOCK
SUPREME COURT AND APPELLATE CLINIC AT THE UNIVERSITY OF CHICAGO LAW SCHOOL
111 E. 60th Street
Chicago, IL 60637

MATTHEW S. HELLMAN
Counsel of Record
ANDREW C. NOLL
KATHRYN L. WYNBRANDT*
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
mhellman@jenner.com

**Not admitted in D.C.; supervised by principals of the Firm*

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Respondents' Statutory Claims Are Reviewable. 4

A. The Court Has Long Distinguished Between Challenges To Congress's Immigration Policy And Challenges To Executive Actions That Exceed Legislative Authority. 6

B. The "Doctrine Of Consular Nonreviewability" Does Not Bar Review Of The Proclamation. 10

II. Respondents Have A Right Of Action For Equitable Relief 16

A. There Is A Long History Of Equitable Review Of Executive Action In Excess Of Statutory Authority. 17

B. Respondents' Challenge To The Proclamation May Be Brought In Equity. 24

CONCLUSION 29

TABLE OF AUTHORITIES

CASES

American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902) 20, 21

Arbaugh v. Y&H Corp., 546 U.S. 500 (2006) 16

Armstrong v. Exceptional Child Center, Inc., 135 S. Ct. 1378 (2015) 4, 17, 24, 25

Brown v. Swann, 35 U.S. (10 Pet.) 497 (1836) 28

Carroll v. Safford, 44 U.S. (3 How.) 441 (1845) 20

Chinese Exclusion Case, 130 U.S. 581 (1889) 6, 7

Dalton v. Specter, 511 U.S. 462 (1994) 21

Dames & Moore v. Regan, 453 U.S. 654 (1981) 23

Fiallo v. Bell, 430 U.S. 787 (1977) 6, 10

Fong Yue Ting v. United States, 149 U.S. 698 (1893) 7

Gegiow v. Uhl, 239 U.S. 3 (1915) 12, 13

Harmon v. Brucker, 355 U.S. 579 (1958) 22

Heckler v. Chaney, 470 U.S. 821 (1985) 14

INS v. St. Cyr, 533 U.S. 289 (2001) 8

International Union of Bricklayers & Allied Craftsmen v. Meese, 761 F.2d 798 (D.C. Cir. 1985) 11

Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838) 20

Kerry v. Din, 135 S. Ct. 2128 (2015) 10

Kleindienst v. Mandel, 408 U.S. 753 (1972) 9, 10

Leedom v. Kyne, 358 U.S. 184 (1958) 22, 23

Lem Moon Sing v. United States, 158 U.S. 538 (1895) 8

Ludecke v. Watkins, 335 U.S. 160 (1948) 13

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 19, 20

Nishimura Ekiu v. United States, 142 U.S. 651 (1892) 7, 8

Pawlett v. Attorney General, 145 Eng. Rep. 550 (Ex. 1668) 18

Porter v. Warner Holding Co., 328 U.S. 395 (1946) 28

Rex v. Barker, 97 Eng. Rep. 823 (K.B. 1762) 19

Saavedra Bruno v. Albright, 197 F.3d 1153 (D.C. Cir. 1999) 11

Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993) 3, 15

Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017) 6, 11, 12

Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953) 9

United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950) 8, 9, 12, 13

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 21

Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189 (2012) 13-14

STATUTES

5 U.S.C. § 559 27

6 U.S.C. § 236(f) 15

8 U.S.C. § 1252 14

8 U.S.C. § 1252(a)(1) 14

8 U.S.C. § 1252(e)(1)(A) 14

50 U.S.C. §§ 1701 *et seq.* 23

OTHER AUTHORITIES

Amicus Curiae Brief of Professors of Constitutional, Immigration, and Administrative Law in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) (No. 15-1204), 2016 WL 6276665 12

Brief of Respondent, *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993) (No. 92-344), 1992 WL 541267 16

Brief of United States, *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993) (No. 92-344), 1992 WL 541276 15

Richard H. Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts and the Federal System* (7th ed. 2015) 18

The Federalist No. 78 (Clinton Rossiter ed., 1961) (Alexander Hamilton) 19

Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1 (1963) 18

David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 Okla. L. Rev. 29 (2015) 7

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Reply Brief of United States, *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993) (No. 92-344), 1993 WL 290141 15

Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 Colum. L. Rev. 1612 (1997) 19, 27

INTEREST OF *AMICI CURIAE* [1]

Amici curiae are leading federal courts scholars with expertise regarding judicial review of executive action. *Amici* have a professional interest in ensuring that the Court is fully informed of the law and history relevant to this case, which implicates fundamental questions of checks and balances among the three branches of the federal government.

Specifically, *amici* submit this brief to address the government's argument that respondents' challenge to Proclamation 9645 is unreviewable. *Amici* address two of the government's central arguments against judicial review: first, that petitioners' conduct is unreviewable because it concerns the immigration of noncitizens who are outside the United States; and second, that the courts lack equitable power in this case to enjoin executive officers for actions taken in excess of their statutory authority.

The history of these doctrines and this Court's cases demonstrate that the courts have consistently been open for claims like respondents'. In the view of *amici*, holding these claims unreviewable would represent a marked and unwarranted change in the law.

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[1] Petitioners have filed with this Court a blanket letter of consent to the filing of *amicus* briefs. Respondents have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

The *amici* are:[2]

- Erwin Chemerinsky, Dean and Jesse H. Choper Distinguished Professor of Law, University of California, Berkeley School of Law;
- Michael C. Dorf, Robert S. Stevens Professor of Law, Cornell University Law School;
- Aziz Huq, Frank and Bernice J. Greenberg Professor of Law, University of Chicago Law School;
- Gillian Metzger, Stanley H. Fuld Professor of Law and Faculty Director of the Center for Constitutional Governance, Columbia Law School; and
- David Strauss, Gerald Ratner Distinguished Service Professor of Law, University of Chicago Law School.

SUMMARY OF ARGUMENT

Respondents' claims that Proclamation 9645 is unlawful are reviewable. A long tradition of judicial review permits individuals who are injured in fact by unlawful executive branch actions to sue for redress. The government asserts that, in this case, doctrines of nonreviewability applicable to immigration matters bar respondents' claims; the government further maintains that respondents have no cause of action. Both assertions are in error.

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[2] Academic affiliations are listed for identification purposes only.

I. Respondents claim, among other things, that the Proclamation exceeds the authority granted by Congress in 8 U.S.C. § 1182(f) and violates the terms of 8 U.S.C. § 1185(a). In response, the government asserts that there is a "separation-of-powers principle" that "the political branches' decisions" to forbid entry by noncitizens "generally are not judicially reviewable." Pet. Br. 17. To support this vaguely defined principle, the government invokes several lines of decisions—none of which addressed claims like those here. Some involved questions of *congressional* power, not statutory limits on executive power; some, discretionary decisions by government employees in individual cases. In the one case that presented an issue like this one—*Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), which, like this case, was a statutory challenge to a Presidential order—the Court implicitly rejected the government's nonreviewability argument, which was virtually identical to the one the government makes here, and resolved the issues on the merits.

II. *Amici* agree with respondents that Administrative Procedure Act review is available here. *See* Resp. Br. 20-26. To the extent this Court agrees, it need not reach the question whether a court has the equitable authority to enjoin the enforcement of the Proclamation. If the Court concludes that APA review is unavailable, however, it should hold that it has the equitable power to enjoin unlawful executive action in this case.

A long line of authority from this Court (and its English predecessors) establishes that courts, sitting in equity, will review claims that executive officials

exceeded their statutory authority. The government invokes *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015). But *Armstrong* explicitly recognized the "long history of judicial review of illegal executive action, tracing back to England," and reaffirmed the "power of federal courts of equity to enjoin unlawful executive action," subject to statutory limitations. *Id.* at 1384-85. The claim in *Armstrong* was unreviewable only because of two features of the particular statute at issue in that case that have no counterparts here.

That leaves the government to argue that it would "eviscerate" the APA's limits on judicial review if a court had the equitable power to enjoin unlawful executive action where APA review was unavailable. But the government's notion that if review is unavailable under the APA it must be unavailable in any other form is simply a non sequitur. It is also contradicted by history: An equitable cause of action antedates the APA by centuries, and this Court has unhesitatingly continued to exercise its equitable powers to consider claims like respondents' since the enactment of the APA.

ARGUMENT

I. Respondents' Statutory Claims Are Reviewable.

In addition to their constitutional claims, which the government concedes are reviewable, *see* Pet. Br. 14-15, 21, 25 n.8, 26, respondents allege that the Proclamation exceeds the authority granted by Congress in 8 U.S.C. § 1182(f) and violates the anti-discrimination provisions

of 8 U.S.C. § 1152(a)(1)(A). In reply, the government asserts that there is a "separation-of-powers principle" that "the political branches' decisions to exclude aliens abroad" are "generally . . . not judicially reviewable" and that this principle "bars any review of respondents' statutory claims." Pet. Br. 17. But the government fails to show that this sweeping and vaguely-defined "principle" makes claims like respondents' unreviewable.

The cases the government relies upon hold that *Congress* has broad power—sometimes characterized as "plenary power"—to enact legislation dealing with immigration. Whatever the present-day validity of the broad language in these cases, none of these cases supports the government here, because respondents do not seek to limit congressional power; to the contrary, they seek to vindicate Congress's authority, by prohibiting the executive from exceeding it.

In addition, some cases have indicated that individualized, discretionary immigration decisions that government officials make when exercising their statutory authority are not judicially reviewable. But this case does not involve such a particularized determination. Instead, it raises questions of the kind that courts deal with routinely: whether an executive branch policy, supposedly adopted on the basis of an administrative record, exceeds statutory authority. This Court has consistently entertained claims like that.

A. The Court Has Long Distinguished Between Challenges To Congress's Immigration Policy And Challenges To Executive Actions That Exceed Legislative Authority.

Respondents claim that the Proclamation is inconsistent with legislation enacted by Congress. The government's response is to assert that immigration decisions are "largely immune from judicial control." Pet. Br. 18 (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)). But, as the very opinion quoted by the government reveals, the cases on which the government relies deal with "the legislative power of Congress." *Fiallo*, 430 U.S. at 792 (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U. S. 320, 339 (1909)). They do not provide an "immun[ity] from judicial control" to executive branch officials who are alleged to have exceeded the power granted by Congress. *Id.* (citation omitted).

1. This Court's decisions have sometimes used broad language to describe the power of the federal government to control immigration and the limited role of courts; the federal government's power in the area was sometimes characterized as "plenary." Whatever the continuing vitality of the plenary power doctrine—and it is clear today that federal power in the area of immigration is subject to constitutional limits[3]—the expansive language quoted by the government addresses the power of *Congress*. The *Chinese*

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[3] *Compare Fiallo v. Bell*, 430 U.S. 787 (1977), *with Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017).

Exclusion Case, 130 U.S. 581 (1889), which is often considered to be the origin of the "plenary power" doctrine, *see* David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 Okla. L. Rev. 29, 30 (2015), was a challenge to a statute prohibiting Chinese laborers who left the United States from returning, *see* 130 U.S. at 589. The Court, ruling for the government, held that the Constitution vests *in Congress* the power to pass laws concerning immigration and upheld the statute as a constitutional exercise of that power: "That the government of the United States, through the action of the *legislative* department, can exclude aliens from its territory is a proposition which we do not think open to controversy." *Id.* at 603 (emphasis added).

The Court took the same approach in *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892), and *Fong Yue Ting v. United States*, 149 U.S. 698 (1893). *Nishimura Ekiu* upheld the exclusion of a Japanese noncitizen, and *Fong Yue Ting* upheld the expulsion of a Chinese noncitizen—both in accordance with statutory authorization. In each case, the Court started with the principle that the Constitution commits control of international relations (and by extension, exclusion and expulsion) to "the political department of the government," and explained that that power "may be exercised either through treaties made by the president and the senate, or by statutes enacted by congress . . . ." *Nishimura Ekiu*, 142 U.S. at 659; *Fong Yue Ting*, 149 U.S. at 705.

2. The principle stated in these cases, whatever its proper scope, shielded *Congress*'s immigration policy

from judicial review. It did not shield actions of executive officers alleged to have been taken in excess of, or inconsistent with, what Congress authorized. To the contrary: as the Court has explained, the "historical practice in immigration law" is that "[t]he writ of habeas corpus has always been available to review the legality of Executive detention." *INS v. St. Cyr*, 533 U.S. 289, 305 (2001). Thus, in *Nishimura Ekiu* the Court explained that it was because the executive official's actions to exclude the noncitizen were "in conformity with the act" and "within the authority conferred upon him by th[e] act," that they could not be overturned by the Court. 142 U.S. at 663-64; *see also Lem Moon Sing v. United States*, 158 U.S. 538, 546 (1895) (*Nishimura* and *Fong Yue Ting* permit "excluding judicial interference *so long as* such officers acted within the authority conferred upon them by congress" (emphasis added)).

In the twentieth century, this Court continued to draw the same distinction between legislative determinations of immigration policy and executive action carrying out that policy on the one hand, and challenges to executive action as exceeding legislative authorization on the other. For example, in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 539-40 (1950), the Court refused to require a hearing before the Attorney General excluded the noncitizen wife of an American citizen on the ground that her admission would prove prejudicial to the interests of the United States. *Id.* at 539-40. Although the Court referred to "inherent executive power," *id.* at 542, it did so only to rebut the argument that Congress had delegated excessive authority to the executive branch—not to

suggest that the Court would refuse to consider a claim that an executive official had exceeded statutory authority, *see, e.g., id.* at 542-43. To the contrary, the Court carefully explained that the Attorney General's decision was within both the statutory authority granted by Congress and regulations issued pursuant to the relevant statute, and that the regulations themselves were authorized by statute. *Id.* at 540-42, 544-45. That explanation would have been unnecessary if the Court considered executive branch decisions to be entirely unreviewable.

Likewise, in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), the Court declined to require a hearing in connection with the Attorney General's determination that a noncitizen's entry would be prejudicial to the public interest for security reasons. Congress had "expressly authorized the President to impose additional restrictions on aliens entering or leaving the United States during periods of international tension and strife." *Id.* at 210. Those additional restrictions included the power to exclude a noncitizen without a hearing when based on confidential information. But the Court explicitly noted that the Attorney General had acted "in accord with" the governing statute and regulations. *Id.* at 211.

More recent cases have emphasized the same points. In *Kleindienst v. Mandel*, 408 U.S. 753 (1972), the Court upheld the Attorney General's refusal to allow a Belgian Marxist to come to the United States to give a speech. Yet the Court explicitly considered whether the Attorney General's action complied with the governing statute: "[W]e think the Attorney General validly

exercised the plenary power that Congress delegated to the Executive by [the statute]." *Id.* at 769. And in *Kerry v. Din*, 135 S. Ct. 2128 (2015), a case in which there was no majority opinion, Justice Kennedy's concurrence reasoned that the Due Process Clause (assuming it applied) was satisfied because a consular official's decision to deny a visa "was controlled by specific statutory factors" and "rested on a determination that [the applicant] did not satisfy the statute's requirements." *Id.* at 2140 (Kennedy, J., concurring).

Finally, *Fiallo v. Bell*, 430 U.S. 787 (1977), on which the government relies most extensively, involved no issue of executive power at all. The only issue in that case was the constitutionality of a *statute* concerning immigration preferences for parents or children of citizens or lawful permanent residents. *See, e.g.*, 430 U.S. at 788-90. The Court's statements about the importance of deference repeatedly referred to Congress's powers. *See, e.g., id.* at 792, 793, 796, 798, 799. Even so, the Court explicitly rejected—twice—the government's contention, in that case, that Congress's immigration decisions were entirely unreviewable. *See id.* at 793 n.5, 795 n.6.

B. The "Doctrine Of Consular Nonreviewability" Does Not Bar Review Of The Proclamation.

1. The government also refers to "the doctrine of consular nonreviewability," Pet. Br. 19, 23 (quoting *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159, 1160 (D.C. Cir. 1999)). The government's contention appears to be that this doctrine bars judicial review whenever "the Executive decides to deny entry to an alien abroad," including in this case. *See id.* at 19. That

contention is incorrect. This doctrine, assuming its validity, applies as it name suggests: to individual decisions by consular officials to deny a visa to a particular noncitizen. It does not apply to a general executive branch policy like the Proclamation.

The government identifies no statute that establishes this doctrine, and the term "consular nonreviewability" appears never to have been used by this Court. As authority for the doctrine, the government cites *Saavedra Bruno v. Albright*, 197 F.3d 1153 (D.C. Cir. 1999), a decision of the District of Columbia Circuit that declined to review an official's denial of a visa application by an individual noncitizen. The District of Columbia Circuit has, however, explicitly *refused* to apply "consular nonreviewability" to a general guideline issued by federal immigration authorities. *See Int'l Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798, 801 (D.C. Cir. 1985). The doctrine, that court said, "has no application [when a party] do[es] not challenge a particular determination in a particular case of matters which Congress has left to executive discretion." *Id.* The court drew precisely the distinction between "challenges to a decision by a consular officer on a particular visa application" and a challenge to a General Operations Instruction promulgated by immigration authorities. *Id.* Thus, the very authority cited by the government—the law of the District of Columbia Circuit—demonstrates that the doctrine the government invokes does not apply to respondents' claims.

The government heavily relies on two mid-twentieth century cases—*Shaughnessy v. United States*

ex rel. Mezei, 345 U.S. 206 (1953), and *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950)—but those cases, too, dealt with specific determinations involving individual noncitizens, not a general policy. In each case, Congress gave executive branch officials broad discretion to determine whether particular noncitizens should be admitted. It was only in that context that the Court described the executive branch decision as "final and conclusive." *Knauff*, 338 U.S. at 543. And the Court's statement of the principle of nonreviewability—as questionably broad as it was—was confined to that context: "[I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude *a given alien*." *Id.* (emphasis added); *see also Mezei*, 345 U.S. at 211.[4]

Even in cases in which Congress seemingly granted unreviewable authority to executive branch officials, the Court nevertheless reviewed, on the merits, arguments that the officials had exceeded their authority. For example, in *Gegiow v. Uhl*, 239 U.S. 3 (1915), the Court, in an opinion by Justice Holmes, overturned the exclusion of a particular noncitizen on the ground that

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[4] Some of the language in *Knauff* and *Mezei* has been taken to mean that the Due Process Clause imposes no limits on the procedures that can be used in connection with the exclusion of a particular noncitizen, or perhaps even that noncitizens can be detained without due process. For a rebuttal of that view, see the Amicus Curiae Brief of Professors of Constitutional, Immigration, and Administrative Law, *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) (No. 15-1204), 2016 WL 6276665. (Some of the amici here were among the amici on that brief as well.) That issue is not before the Court in this case.

the "commissioner of immigration [ha]s exceed[ed] his power" by entering the order of exclusion on the basis of factors he was not authorized to consider. *Id.* at 9. In *Ludecke v. Watkins*, 335 U.S. 160 (1948), the Court, while recognizing that the President had unreviewable power to order the removal of a German noncitizen under the Alien Enemy Act, considered on the merits a claim that the President's authority under that Act had expired with the end of hostilities. *See id.* at 166-72. And even in *Knauff*, the Court considered on the merits a statutory argument that the War Brides Act had terminated the Attorney General's authority to exclude the noncitizen who sought relief in that case. *See* 338 U.S. at 545-47.

Most important, these cases, like the lower court "consular nonreviewability" cases, involved the application of criteria, specified by statute and authorized regulations, to particular noncitizens. As the District of Columbia Circuit recognized, review of a general policy, like the Proclamation, is entirely different from review of a particularized, fact-laden, discretionary decision in a specific case. That is especially true when those particularized decisions are made in large numbers by consular officials at scattered outposts abroad. Judicial review of the Proclamation requires the Court to interpret statutes and determine if an executive action, which is supposedly supported by an administrative record, exceeds the authority granted by Acts of Congress. This is "a familiar judicial exercise," *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566

U.S. 189, 196 (2012), and one that courts perform every day.[5]

2. Petitioners claim that the immigration-related principles of nonreviewability that they purport to identify, including consular nonreviewability, are "embodied in" 8 U.S.C. § 1252. Pet. Br. 19. But Section 1252 has no application to this case. Section 1252, like the doctrine of consular nonreviewability, deals with individual noncitizens, not general policies. *See* 8 U.S.C. § 1225(a)(1), 1225; *cf.* Pet. Br. 19. Section 1252 limits judicial review of a "final order of removal," 8 U.S.C. 1252(a)(1), and "an order to exclude an alien in accordance with [8 U.S.C. §] 1225(b)(1)," 8 U.S.C. 1252(e)(1)(A). The Proclamation is neither of those things. Petitioners do not contend otherwise.

Petitioners also assert that "Congress has expressly rejected a cause of action to seek judicial review of visa denials." Pet. Br. 19. But the provision petitioners cite—6 U.S.C. § 236(f)—does no such thing. It provides that "*[n]othing in this section* shall be construed to create or authorize a private right of action to challenge"

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[5] The government asserts that "[i]t would invert the constitutional structure" to permit review of the Proclamation while the decisions of "subordinate" executive branch officials may be unreviewable. Pet. Br. 21. But whether a decision is reviewable is not a function of the decisionmaker's position in the executive branch hierarchy. Perhaps the most prominent example of an unreviewable decision in our system is the "decision of a prosecutor in the Executive Branch not to indict," *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)—a decision typically made by a "subordinate" member of the executive branch. At the same time, general policies concerning non-enforcement can be subject to review. *See, e.g., id.* at 833 n.4.

the grant or denial of a visa. 6 U.S.C. § 236(f) (emphasis added). Rights of action derived from the Administrative Procedure Act or the traditions of equity are unaffected. Like 8 U.S.C. § 1252, this provision leaves intact the ability of respondents to bring their claims.

3. Finally, *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993)—the case that most closely resembles this one—is further confirmation, if any is needed, that this challenge to the Proclamation is reviewable. In *Sale*, the Court resolved on the merits a claim that an executive order violated the Immigration and Nationality Act and the United Nations Convention Relating to the Status of Refugees by directing the Coast Guard to return vessels illegally transporting passengers from Haiti to that country without determining whether the passengers qualified as refugees.

Sale resembles this case in nearly every respect. The executive order in *Sale*, like the Proclamation, was, of course, a general policy, not a decision about the admission of a specific noncitizen. Like the Proclamation, the executive order in *Sale* was based in part on 8 U.S.C. § 1182(f) and the President's authority over the admission of noncitizens. *See* 509 U.S. at 164 n.13. And the government in *Sale* urged the Court to hold that the claim was unreviewable, making arguments very similar to those it makes here. *See* Brief of United States at 13-18, *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993) (No. 92-344), 1992 WL 541276; Reply Brief of United States at 1-4, *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993) (No. 92-344), 1993 WL 290141. The parties challenging the executive order

responded to those arguments. *See* Brief of Respondent at 50-58, *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993) (No. 92-344), 1992 WL 541267. In these circumstances, in which the parties emphatically "cross[ed] swords over" the reviewability of the executive action, *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 512 (2006), the Court's decision to resolve the case on the merits was an implicit rejection of the government's position.

The government tries to distinguish *Sale* on the ground that the noncitizens in that case invoked rights under treaties and statutes not to be returned to their home country, as opposed to seeking entry into the United States. *See* Pet. Br. 22. But this argument cannot be reconciled with the government's repeated assertion that executive decisions dealing with immigration are nonreviewable because immigration is "interwoven with contemporaneous policies in regard to the conduct of foreign relations." *E.g.*, *id.* at 18 (citation omitted). *Sale* dealt directly with both treaty obligations and the relationship between a foreign sovereign and its citizens. By the government's own account, therefore, *Sale* presented a much stronger case for nonreviewability than this case does. The Court's willingness to review the executive decision in *Sale* demonstrates, *a fortiori*, that review is appropriate here.

II. Respondents Have A Right Of Action For Equitable Relief.

Respondents assert, and the Ninth Circuit below agreed, that respondents have a cause of action to make their statutory claims under both the Administrative

Procedure Act and traditional principles of equity. We agree with respondents that the APA provides a cause of action in this case. Should the Court conclude otherwise, however, the Court should allow this case to proceed as a suit in equity to enjoin the government from acting beyond its statutory authority.

The government does not deny that courts have equitable authority to enjoin government officials from violating the Constitution. *See* Pet. Br. 22, 26. Nonetheless, the government contends that respondents may not sue in equity to enforce their claims that government officials have exceeded their statutory authority in this case. *Id.* at 26.

That contention is incorrect. Just three Terms ago, the Court acknowledged its "long history of judicial review of illegal executive action, tracing back to England." *Armstrong*, 135 S. Ct. at 1384. This history demonstrates that an equitable claim seeking to restrain unauthorized executive action may be brought here.

A. There Is A Long History Of Equitable Review Of Executive Action In Excess Of Statutory Authority.

1. Suits in equity to restrain *ultra vires* executive action are rooted in English law. This is particularly significant because it belies the government's suggestion that equitable actions are appropriate for constitutional but not statutory claims: in England, of course, there was no counterpart to a constitutional claim.

The early antecedents to suits seeking relief against the government were in medieval England, where King

Edward I invited those with complaints to come before him. Petitions that sought a legal remedy, so-called petitions of right, if endorsed by the Crown, would be investigated by Chancery and then referred to the appropriate court. *See* Richard H. Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts and the Federal System* 878 (7th ed. 2015); James E. Pfander, *Sovereign Immunity and the Right to Petition*, 91 Nw. U. L. Rev. 899, 909 (1997). In the seventeenth century, the Court of Exchequer exercised jurisdiction over equitable actions against the state. *See* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 6 (1963). This system was premised on the notion that individuals "ought . . . to be relieved against the King, because the King is the fountain and head of justice and equity; and it shall not be presumed, that he will be defective in either. And it would derogate . . . the King's honour to imagine, that what is equity against a common person, should not be equity against him." *Pawlett v. Attorney General*, 145 Eng. Rep. 550, 552 (Ex. 1668).

The equitable remedies we are familiar with today originated later in England. Lord Coke, as Chief Justice of the King's Bench, claimed for the King's Bench the power to issue writs of mandamus in 1615. Jaffe, *supra*, at 16. Mandamus could be sought "where government has simply refused to take action in the individual's favor, whether that action involves conferring a positive benefit or an indirect threat." *Id.* A century later, Lord Chief Justice Mansfield announced that mandamus "ought to be used upon all occasions where the law has established no specific remedy, and where in justice and

good government there ought to be one." *Rex v. Barker*, 97 Eng. Rep. 823, 824-25 (K.B. 1762).

2. American courts retained the English courts' tradition of reviewing executive action that was alleged to exceed the official's authority. *Cf.* The Federalist No. 78, at 467 (Clinton Rossiter ed., 1961) (Alexander Hamilton) ("There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void."). *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), is the leading example. Marbury, who had been appointed Justice of the Peace, brought suit against the Secretary of State, James Madison, to compel Madison to deliver Marbury's commission. *Id.* at 139. Though Congress empowered the courts to issue the writ of mandamus, no statute gave Marbury a cause of action. *See* Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 Colum. L. Rev. 1612, 1630 (1997). Accordingly, Marbury pursued mandamus relief in equity.

The Court concluded that mandamus was an appropriate remedy. *See Marbury*, 5 U.S. (1 Cranch) at 173. In doing so, the Court distinguished between executive action committed to executive discretion by the legislature and executive action that exceeded the scope of discretion the legislature afforded. *Compare id.* at 166 ("[W]hatever opinion may be entertained of the manner in which executive discretion may be used, still there exists . . . no power to control that discretion."), *with id.* ("But when the legislature proceeds to impose on that officer other duties . . . [he] cannot at his discretion sport away the vested rights of others."). The

Court concluded that delivery of a commission fell into the latter category, so the claim was reviewable. *Id.* at 165-66. Upon such review, the Court determined that Madison's refusal to deliver the commission was unlawful. *Id.* at 168. Thus, Marbury, using an equitable cause of action, prevailed on the merits of his statutory claim—although the Court of course concluded that the Constitution did not permit Congress to grant it original jurisdiction to issue mandamus. *Id.* at 175–76.

The Court adhered to *Marbury*'s approach in the years that followed. In *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 609 (1838), plaintiffs claimed that the Postmaster General withheld credits to which they were entitled by statute. The Court stated that "the authority to issue the writ of mandamus to an officer of the United States, commanding him to perform a specific act required by a law of the United States, is within the scope of the judicial powers of the United States." *Id.* at 618. And in *Carroll v. Safford*, 44 U.S. (3 How.) 441 (1845), the Court, in describing the bases for concluding that legal remedies were inadequate so that an equitable claim should be allowed, explained that equity would be available "[t]o restrain public officers from doing an illegal act" because "[i]f the act be consummated, there may be no redress; equity, therefore, interferes to prevent the consequent failure of justice by enjoining the act." *Id.* at 453.

American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902), made the official's lack of authority, rather than the injury to the plaintiff, the central focus of a suit in equity. The plaintiffs challenged the Postmaster General's decision to order the retention

of mail sent to their businesses; the relief they sought was to enjoin the local postmaster from carrying out the order. *Id.* at 103. The Court emphasized the lack of statutory authority for the official action and ruled that the unauthorized nature of the official act was what justified equitable relief. The Court explained that the Postmaster General's "right to exclude letters, or to refuse to permit their delivery to persons addressed, must depend upon some law of Congress, and if no such law exists, then he cannot exclude or refuse to deliver them." *Id.* at 109. Because the Postmaster General's act was unauthorized, it "violate[d] the property rights of the person whose letters are withheld" and "the courts, therefore, must have power in a proper proceeding to grant relief." *Id.* at 110.

3. The tradition of providing equitable relief for unauthorized official action continued after Congress created new statutory causes of action for suing the government, such as in the Administrative Procedure Act. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), is perhaps the most celebrated example. Steel companies sought to enjoin the operation of an executive order that directed the seizure of steel mills. They asserted that "the seizure was not authorized by an act of Congress or by any constitutional provisions." *Id.* at 583. The Court agreed and granted relief.

Youngstown considered critical issues of constitutional law, but the plaintiffs did not assert a violation of any constitutional right. *See Dalton v. Specter*, 511 U.S. 462, 473-74 (1994). To the extent the government's suggestion in this case is that when sensitive matters of national security are allegedly at

stake equitable relief should be limited to violations of constitutional rights—and should not extend to claims that the executive has exceeded its statutory authority—*Youngstown* is inconsistent with the government's position.

In 1958, the Court twice entertained claims for equitable relief where plaintiffs claimed that federal officials acted beyond their statutory authority. In *Harmon v. Brucker*, 355 U.S. 579 (1958) (per curiam), former soldiers asserted that the Secretary of the Army acted beyond his statutory authority when he discharged them "in form other than 'honorable'" on the basis of pre-induction activities. *Id.* at 580-81. The Court held that the district court had the "power to construe the statutes involved to determine whether the [Secretary] did exceed his powers" when discharging the petitioners. *Id.* at 582. That is because, as a general matter, "judicial review is available to one who has been injured by an act of a government official which is in excess of his express or implied powers." *Id.* at 581-82. If the executive official did exceed his statutory authority, "judicial relief from this illegality would be available." *Id.* at 582. On the merits, this Court determined that the "actions of the Secretary of the Army cannot be sustained," and remanded the case "for the relief to which petitioners are entitled." *Id.* at 582-83.

In *Leedom v. Kyne*, 358 U.S. 184 (1958), a labor organization challenged the NLRB's decision to include both professional and nonprofessional employees in a bargaining unit. The statute appeared to require that a majority of professional employees vote in favor before

being included in such a unit, and the Board refused to take a vote. *See id.* at 185-86. The plaintiffs characterized the NLRB's decision as one that "exceeded its statutory power." *Id.* at 186.

The agency's order was not reviewable under the National Labor Relations Act, but the Court concluded that "the law, 'apart from the review provisions of the. . . Act,' afford[s] a remedy." *Id.* at 188 (citation omitted). The Court explained that the "suit is not one to 'review,' in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." *Id.*

Finally, in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Court again entertained an action for an injunction based on a claim that executive officials had exceeded their statutory authority. The petitioners sued to prevent the enforcement of a series of executive orders issued by the President, along with Treasury Department regulations, that implemented the hostage release agreement with Iran. *Id.* at 666-67. The petitioners asserted that "the actions of the President and the Secretary of the Treasury . . . were beyond their statutory and constitutional powers." *Id.* at 667. The Court disagreed and upheld the government's actions on the merits, relying partly on the International Emergency Powers Act (IEEPA), 50 U.S.C. § 1701 *et seq.* itself and partly on inferences drawn from the IEEPA, other legislation, and historical practice. *See* 453 U.S. at 669-88.

B. Respondents' Challenge To The Proclamation May Be Brought In Equity.

Respondents' claims fit comfortably within the tradition we have described. Respondents have brought a suit in equity, asserting that the Proclamation is unauthorized by Section 1182(f) and violates Section 1152(a)(1)(A). This is the kind of suit, alleging government action in excess of statutory authorization, that courts have entertained in both the recent and distant past.

The government's response is to invoke *Armstrong v. Exceptional Child Center* and to assert that an equitable action would "sidestep 'express and implied statutory limitations' on judicial review of nonconstitutional claims, such as under the APA" and thereby "eviscerate" the APA's "limits on judicial review." Pet. Br. 26. The government's arguments are misconceived.

1. *Armstrong*, in fact, supports the availability of an equitable claim in this case. The plaintiffs in *Armstrong* contended that Idaho had not reimbursed them for medical services at the rate required by the Medicaid Act, and they sought injunctive relief for that alleged violation of federal law. 135 S. Ct. at 1382. The Court in *Armstrong* noted the "long history of judicial review of illegal executive action, tracing back to England," *id.* at 1384; recognized that federal courts may enjoin "violations of federal law by federal officials," *id.* (citing *Am. Sch. of Magnetic Healing*, 187 U.S. at 110); and expressly reaffirmed "[t]he power of federal courts of equity to enjoin unlawful executive action," *id.* at 1385.

In all of those respects, *Armstrong* confirms that there is nothing novel about respondents' invoking a cause of action in equity.

The *Armstrong* Court denied relief because the "combin[ation]" of two factors caused the Court to conclude that Congress had intended to foreclose the equitable relief sought in that particular case. 135 S. Ct. at 1385. First, Congress had expressly conferred enforcement authority solely upon the Secretary of Health and Human Services, who could "withhold[] funds" to a state that failed to comply with the Medicaid Act. *Id.* Second, the relief sought by the plaintiffs in that case was "judicially unadministrable" because of the "sheer complexity" of assessing whether Idaho's Medicaid reimbursement rates satisfied the statutory requirements. *Id.*

Nothing analogous to those factors is present here. Congress has not provided an alternative remedy for respondents comparable to the Secretary's enforcement authority in *Armstrong*. Unlike in *Armstrong*, therefore, denying a right of action here would mean that respondents have no remedy at all. The issues presented on the merits in this case are questions of statutory interpretation that are not extraordinarily technical or intricate. They do not, for example, require the courts to engage in rate-setting based on a variety of technical policy factors. It follows that, under *Armstrong*, respondents may invoke the traditional equitable remedy by asserting that the Proclamation exceeds statutory authority.

2. Petitioners emphasize the *Armstrong* Court's statement that an equitable action is subject to "'express

and implied statutory limitations' on judicial review of nonconstitutional claims." Pet. Br. 26 (quoting *Armstrong*, 135 S. Ct. at 1384). There is no express statutory limitation here: no statute explicitly withdraws the traditional equitable remedy in this case. The statutes petitioners point to, 8 U.S.C. § 1252 and 6 U.S.C. § 236(f), conspicuously do not do so. *See supra* at 14-15. Instead, petitioners appear to be asserting that "limitations" are imposed on respondents' equitable claim by the immigration-related doctrines that we addressed in Part I. As we demonstrated, those supposed doctrines have no application to respondents' claims.

Petitioners also assert that respondents' claims are barred because respondents are not within the "zone of interests" of the statutes they invoke in their complaint. Pet. Br. 24-25. Those statutes, petitioners say, either confer discretion on the President or are addressed to noncitizens, not to persons in the United States. *Id.* at 24; *see id.* at 25 ("The court [of appeals] identified no cognizable right conferred on respondents by the particular INA provisions they invoke").

This argument reflects a basic misunderstanding of the tradition of equitable relief that we have described. A party seeking equitable relief on the ground that a government official has exceeded his authority under a statute does not assert a "cognizable right" under that statute. Dames & Moore, for example, did not assert rights under IEEPA. The firms that challenged the steel seizure in *Youngstown* did not assert rights under Article II of the Constitution. In both instances, the claim was not that the government violated a specific

right granted by a statute; it was that the executive branch's actions exceeded the power that was granted to it and caused an injury in fact. Respondents' claims that the Proclamation exceeds statutory authority are no different. They are claims of unauthorized executive action of the kind that have traditionally been brought in equity.

3. Finally, the government asserts that allowing an equitable action would mean that respondents could "eviscerate" the APA's limits on judicial review by "sidestep[ping]" them. Pet. Br. 26. This assumes, of course, that the APA would bar respondents' claims, an assumption that, as we have noted, we reject. *See* Resp. Br. 20-26. Beyond that, though, the government's premise appears to be that the APA is an exclusive remedy, so that if APA review is not available, neither is equitable relief.

This premise is unfounded. *See, e.g.*, Siegel, *supra*, at 1666 ("Nothing in the APA purports to be exclusive or suggests that the creation of APA review was intended to preclude any other applicable form of review."). The APA imposes its own set of procedural and substantive requirements on agencies and has its own authorizations for judicial review. By its own terms, the APA does "not limit or repeal additional requirements imposed by statute or otherwise recognized by law." 5 U.S.C. § 559. Other remedial regimes impose different "requirements" and have different limits on judicial review.

The APA, since its enactment, has co-existed with, for example, damages actions under the Federal Tort Claims Act and the Tucker Act, as well as habeas corpus.

Most relevant, the enactment of the APA, as we noted, did not affect the Court's willingness to allow suits in equity to challenge government action in momentous cases like *Youngstown* and *Dames & Moore*, as well as in *Sale*. There is, accordingly, no basis for saying that the APA precludes respondents' suit in equity.

Ultimately, the government asks this Court to undermine the rule that "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *see also Brown v. Swann*, 35 U.S. (10 Pet.) 497, 503 (1836) ("The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction."). Against the historical backdrop we have described, nothing in the immigration laws or the APA restricts the equity power of the courts so as to bar adjudication of respondents' claims. Those claims therefore are reviewable.

CONCLUSION

The Court should hold that respondents' claim that petitioners acted in excess of their statutory authority is reviewable.

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Respectfully submitted,

SARAH M. KONSKY
JENNER & BLOCK
SUPREME COURT AND APPELLATE CLINIC AT THE UNIVERSITY OF CHICAGO LAW SCHOOL
111 E. 60th Street
Chicago, IL 60637

MATTHEW S. HELLMAN
Counsel of Record
ANDREW C. NOLL
KATHRYN L. WYNBRANDT*
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
mhellman@jenner.com

**Not admitted in D.C.; supervised by principals of the Firm*